

**Before the  
Federal Communications Commission  
Washington DC 20554**

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**OCT 15 1998**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

**In the matter of**

**Bell Atlantic Telephone Companies  
Tariff FCC No. 1  
Transmittal No. 1076**

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**CC Docket No. 98-168**

**NORTHPOINT COMMUNICATIONS, INC.  
RESPONSE TO DIRECT CASE OF BELL ATLANTIC**

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**October 15, 1998**

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NorthPoint Communications, Inc., pursuant to the Order Designating Issues for Investigation in this matter, hereby files its response to Bell Atlantic's direct case. While it appears to be consistent with Commission precedent to treat the service as interstate, NorthPoint reiterates its strong concern that the Commission should require Bell Atlantic to impute the loop and collocation costs that Bell Atlantic imposes on its competitors. Otherwise, NorthPoint and other CLECs providing DSL service will continue to be subject to an existing "price squeeze" under which Bell Atlantic's charges to NorthPoint for the unbundled network elements necessary to provide competitive DSL service are more than the full retail charge of Bell Atlantic's service. Obviously, facilities-based competition cannot exist where it costs NorthPoint more for a piece of Bell Atlantic's DSL service than it costs retail customers for the entire service. In order to ensure that broadband competition has a chance to develop, and ultimately ensure lower costs and greater choice, the Commission should require Bell Atlantic to impute the costs of

collocation and loops into its federal tariffs. In the alternative, if the Commission is not willing to require imputation, it should defer to the states consideration of both Bell Atlantic's wholesale and retail DSL charges so that the states may properly address price squeeze issues.

It appears that Bell Atlantic's ADSL service is designed to offer a dedicated data connection between an end user and an Internet service provider (ISP). An end user using DSL service for Internet access to an ISP may access a local web site, a non-local web site in the same state, and/or a web site in another state or country. Because of the worldwide nature of the web, it is likely that a majority of web sessions will include access to a web site in a different state or country, thereby rendering the call interstate in nature. In addition, because the ADSL line is dedicated, and flat-rated, it makes sense to have it tariffed in either the state or federal jurisdiction, but not both. In the past, the Commission has asserted jurisdiction over calls to information service providers, largely as a way of preserving a competitive, unregulated environment for ISPs.<sup>1</sup> There has been some confusion about NorthPoint's position on jurisdiction and tariffing, and NorthPoint wishes to clarify that it has no objection to a Commission decision that ADSL is an interstate service.

There are practical consequences to federal tariffing, however, that the FCC should consider in making its decision in this proceeding. In its initial petition to reject, or suspend and investigate the Bell Atlantic ADSL tariffs, NorthPoint noted that: (1) the

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<sup>1</sup> See, e.g. Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp., 7 FCC Rcd 1619 (1992) (Georgia Memory Call Decision). In that decision, in the context of examining who has jurisdiction when a voice mail service is accessed from out of state, the FCC asserted jurisdiction based on the ultimate termination of the call, rather than accepting the theory that there are actually two calls.

proposed tariff would create a price squeeze because the federally tariffed ADSL price was lower than the sum of the prices of the inputs (such as loops and collocation) required for CLECs to offer competing DSL service; and (2) the fact that states govern the input pricing while the ADSL product was tariffed at the federal level would create challenges for federal and state policymakers in detecting and preventing price squeezes. Federal and state regulators need to give some thought to these challenges, and do so quickly, before ILEC price squeezes choke their CLEC competitors.

Price squeezes are a risk whenever CLECs must obtain unbundled network elements from ILECs in order to offer competing service. Price squeezes occur when the retail tariff rates are less than the cost to CLECs of obtaining the unbundled network elements required to compete plus any costs for competitively provided components, such as retailing costs.

Bell Atlantic's proposed rates create a real price squeeze that threatens to throttle DSL competition before it starts. Bell Atlantic manages to price this low because it fails to impute the UNE charges that CLECs must pay, including loop, collocation, and transport.

Bell Atlantic's retail charges are as low as \$39.95 per month (with a \$99 non-recurring charge). By contrast, in order to compete in New York, a DSL CLEC incurs the following costs:

It must pay Bell Atlantic as much as \$32.94 per month for a loop and cross connect;

It must pay Bell Atlantic as much as \$330,000 for a single central office collocation cage.

It must pay Bell Atlantic or an alternative carrier for transport from the central office to a regional node;

It must recover the costs of its DSL equipment, retailing costs and overhead.

Without even taking into account the costs of the CLEC DSL equipment, Bell Atlantic's full retail rate is less than the price it charges CLECs for the loops, collocation and transport necessary to provide DSL service. That is a price squeeze and must be remedied immediately to address the Commission's oft-stated concern for broadband alternatives.

For an equally efficient competitor to compete, Bell Atlantic's retail price must equal or exceed the sum of the prices that Bell Atlantic charges for xDSL-related UNEs. There are at least two ways to achieve this result. First, the FCC could require that ILEC DSL services be federally tariffed, and impose an imputation rule that ensures that Bell Atlantic's rates include the same charges for loop, collocation and transport elements that Bell Atlantic imposes on its CLEC competitors, in addition to charges that recover Bell Atlantic's additional equipment and overhead costs. Alternatively, the FCC could defer to the states, and require ILEC DSL services to be tariffed at the state commissions, which have access to the underlying price information for unbundled network elements. Either approach improves the ability of federal or state decisionmakers to meet their goals of promoting competition, by detecting and preventing anticompetitive behavior including price squeezes.

In its direct case, Bell Atlantic argues that the cost of unbundled loops is not an incremental cost of DSL because the cost of the loop is already recovered through charges

for other services. Bell Atlantic Direct Case at 13. Bell Atlantic also asserts that CLECs have the same opportunity as ILECs to offer a variety of services over those facilities. Bell Atlantic Direct Case at 13-14.

Bell Atlantic admits that the DSL price does not cover the cost of the loop that it charges to its competitors. If Bell Atlantic provided DSL service through a separate subsidiary, as proposed in the Commission's Wireline Advanced Services NPRM,<sup>2</sup> the affiliate would be required to pay the ILEC the same price for loops as the ILEC charges CLEC competitors, because of the non-discrimination provisions and the arm's length transactions requirements. In the absence of a separate affiliate, the same result can be achieved by requiring Bell Atlantic to impute the cost of loops and other network elements in calculating its DSL price. In the context of the Wireline Advanced Services proceeding, Ameritech has agreed that an imputation requirement should apply to ILECs that do not establish separate data affiliates. See Joint Appendix filed by NorthPoint and Ameritech in CC Docket No. 98-147, at 3. If Bell Atlantic and other ILECs do not wish to impute the cost of the loop to their DSL service, they should be required to sell comparable unbundled loops to CLECs at a price of \$0.

Without imputation and resale requirements, ILECs will use the price squeeze to put CLECs out of business. Bell Atlantic, along with other ILECs, is currently denying NorthPoint and other data CLECs the ability to take advantage of the loop economies achieved by providing voice and DSL over the same loop. While Bell Atlantic uses a single copper pair for both voice and ADSL, data CLECs are required to use a dedicated

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<sup>2</sup> Deployment of Wireline Services Offering Advanced Telecommunications Capability, Notice of Proposed Rulemaking, CC Docket No. 98-147, released August 7, 1998.

copper pair for their xDSL services, since the ILECs have indicated they will not accept split-off voice traffic from the CLECs. This is manifestly inefficient, and the Commission should make clear that where CLECs use a single loop to provide both data and voice service, ILECs should be required to accept the split-off traffic from the CLEC at the same price ILECs charge themselves, as well as providing data CLECs with the opportunity to hand off the voice traffic to another CLEC. At the Commission's October 6, 1998 Technical Roundtable on Loop Issues, all participants who spoke to this issue agreed that it was technically feasible. In particular, the ILEC should be required to allow the CLEC to tap into loops at the MDF, where the ILEC would filter the voice traffic from the data traffic. The CLEC would then be able to use the loop both for its broadband service and for reselling the ILEC's voice service.

If the FCC decides that the DSL tariffs should be filed with the FCC, it should also reconfirm that ILECs are required to allow their competitors to resell DSL service at a discount. Section 251(c)(4) of the Communications Act imposes on ILECs "[t]he duty (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. Sec. 251(c)(4). In the Wireline Advanced Services Order, the Commission stated that "incumbent LECs have the obligation to offer for resale, pursuant to section 251(c)(4), all advanced services that they generally provide to subscribers who are not telecommunications carriers."<sup>3</sup> ADSL service is provided to information service providers and end users, which, under the Act, are not telecommunications carriers, and therefore

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<sup>3</sup> Memorandum Opinion and Order in CC Docket Nos. 98-147, 98-11, 98-26, 98-15, 98-78, 98-91 (released August 7, 1998) at para. 60.

falls under the rule established by the Commission. The Commission should clarify that the DSL service at issue in this tariff is subject to the resale requirement when provided by an ILEC and require the ILECs to file within 30 days a wholesale tariff that incorporates that discount.

Finally, the Commission should convene a joint state-federal advisory board to investigate the issue of unbundled network element pricing. Since true competition will not emerge until the prices of UNEs drop from their current inflated levels, such a state-federal advisory board would be well-positioned to share insights into current UNE pricing levels.

The FCC should not, however, make a decision on the jurisdictional issues designated in this investigation without a framework for resolving the significant pricing and other issues raised by this tariff. Rather, the FCC should decide the jurisdictional question in a way that supports the end game, which is to prevent price squeezes and other anticompetitive behavior by ILECs, in order to give the competitive forces a chance to work for consumers.

Respectfully submitted,

Handwritten signature of Steven Gorosh, with the initials 'RM' at the end.

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